



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

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September 26, 2008

Mr. David Cottingham  
Chief, Marine Mammals and Sea Turtles  
Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

ATTN: Right Whale Ship Strike Reduction FEIS

Subject: EPA NEPA Comments on NOAA's FEIS "To implement Vessel Operational Measures to Reduce Ship Strikes to North Atlantic Right Whales"; Western Atlantic Ocean; CEQ# 20080334; ERP# NOA-A91074-00

Dear Mr. Cottingham:

Consistent with our responsibilities under Section 102(2)(C) of the National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act, the U.S. Environmental Protection Agency (EPA) has reviewed the referenced Final Environmental Impact Statement (FEIS) prepared by the National Oceanic and Atmospheric Administration/National Marine Fisheries Service (NOAA/NMFS). EPA previously provided comments on the Draft EIS (DEIS) in a letter dated October 4, 2006.

For the review of this FEIS, EPA has focused on Section 2.3 (*Changes Made Between the DEIS and FEIS*: pg. 2-15) as well as Appendix B (NOAA's responses to comments on the DEIS). Section 2.3 is useful in identifying modifications made in the FEIS in response to public comments documented in Appendix B. In this letter, we have provided comments on the substantive modifications and confirmations associated with NOAA's NEPA preferred alternative (Alternative 6) as refined in the FEIS. In the enclosed *Detailed Comments*, we have also provided suggestions to reorganize future NOAA responses to comments to make them more user-friendly for the benefit of the reviewing public.

## Background

This EIS proposes the implementation of operational measures for a ship strike reduction strategy for the endangered North Atlantic right whale (*Eubalaena glacialis*) in the western Atlantic Ocean along the East Coast of the U.S. The purpose of the EIS is to propose strategies aimed at reducing the number and severity of vessel collisions with

right whales, which have resulted in whale injury or mortality, to help promote species recovery. Current measures to reduce such collisions have not been very successful.

Due to regional variations in whale behavior and oceanographic conditions, three East Coast regions of implementation were considered: northeastern U.S. (NEUS), mid-Atlantic U.S. (MAUS) and southeastern U.S. (SEUS). Proposed vessel operational measures would apply only in certain areas, times of the year, and under certain conditions. All U.S. jurisdictional vessels 65 feet or longer would need to comply, although not all measures would be mandatory. There would also be exceptions for ships operated by (or under contract to) the federal government and state law enforcement vessels when engaged in enforcement or safety activities.

Three operational measures were considered in the FEIS for the five action alternatives (Alternatives 2-6). We understand (pg. ES-11) that NOAA's proposed ship speed restriction is 10 knots per hour (kts/hr), where speed restrictions apply.<sup>1</sup>

\* **Seasonal Management Areas (SMAs)**: Pre-determined/Established areas with seasonal ship speed restrictions. SMAs apply to FEIS Alternatives 3, 4 and 6.

\* **Dynamic Management Areas (DMA)**: Temporary areas that are established when whale sightings are made (a radius is described around the sighting to define the DMA, with radii becoming greater if a larger number of whales are sighted). DMAs apply to FEIS Alternatives 2, 5 and 6 and are either mandatory (Alts. 2&5) or voluntary (Alt. 6).

\* **Routing Measures**: Established routes to minimize the co-occurrence of whales and shipping to reduce potential ship-whale collisions. Use of these routes is voluntary. Recommended routes apply for Alternatives 4-6.

### **FEIS Preferred Alternative**

Alternative 6 remains NOAA's identified preferred alternative in the FEIS. While Alternative 5 is the environmentally preferable alternative, it also has the greatest economic impact to the shipping industry (pg. 2-23). Alternative 6 is a mix of environmental and economic considerations and therefore was preferred by NOAA (pg. 2-23). We note that Alternative 6 is less restrictive than Alternative 5 in several ways described below:

\* **SMA Designations** – Alternatives 5 and 6 differ as to the SMAs designated for each (pg. 2-15). EPA will defer to NOAA regarding the rationale for these differences; however, we suggest a final discussion on SMA designation and size be provided in the NOAA ROD. It appears that at least the size of MAUS SMAs has been refined in the FEIS for Alternative 6, based on the location of the majority of whale sightings within those SMAs (pg. 2-17).

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<sup>1</sup> EPA requests that the NOAA Record of Decision (ROD) verify that the proposed ship speed restriction is 10 kts/hr, or if it is voluntary.

**\* DMA Establishment & Compliance:** The establishment of DMAs is voluntary for Alternative 6 and mandatory for Alternative 5 (pg. 2-15). DMAs were made voluntary for Alternative 6 in the FEIS due to NOAA's resource limitations related to potentially numerous designations in response to spot whale sightings outside SMAs. The effectiveness of this measure would also be reduced due to lag times between initial sightings and establishments of DMAs. In addition, page 2-17 also indicates that voluntary DMAs would "...alleviate the economic burden on whale watch and ferry vessels if a DMA was established in their routes during peak season." For the latter, we suggest that instead of making DMAs voluntary because of these use conflicts, whale watch and ferry vessels might be exempted from the operational measures (due to their frequent if not intended encounters with whales), while establishment of DMAs could remain mandatory for other vessels.

We also note that for all alternatives, only one of the two triggers for establishing DMAs described in the DEIS was retained in the FEIS due to economics. That is, DMAs are only triggered if three or more whales are sighted (sighting one or more whales within specified areas (e.g., recommended shipping route) was therefore dropped).

EPA can appreciate the economic and administrative hardships associated with DMA establishment and compliance based on whale sightings in areas outside SMAs. Nevertheless, we request that the ROD attempt to estimate how many additional whale collisions can be expected if DMAs are voluntary or if the second trigger (DEIS) is no longer required for establishing DMAs. Also, would these estimated ship strikes still be consistent with the Endangered Species Act for the recovery of the right whale?

**\* Speed Restrictions:** EPA agrees with limiting ship speeds to 10 kts/hr for greater protection against ship-whale collisions, as opposed to the other faster 12- or 14-kts/hr ship speeds previously considered. Speed restrictions would appear to apply for both Alternatives 5 and 6. Although not a separate operational measure, Table 2-5 would have been improved with the inclusion of a by-alternative clarification as to whether speed restrictions apply. For example, would speed restrictions still apply in DMAs for Alternative 6 since DMAs are now proposed (FEIS) to be voluntary?

Although the time for trips would increase with the proposed speed restriction, the slower speed may also reduce emissions and save fuel. We request that the ROD also discuss the air quality and energy aspects of the proposed ship speed reduction.

**\* Routing Measures:** Alternatives 5 and 6 will continue to have recommended routes for voluntary use.

**\* Term of Measures:** The term of the operational measures would be limited to five years under FEIS Alternative 6. As such, the proposed measures would be somewhat of a pilot program. We understand that NOAA will provide (resources permitting) effects monitoring within this five-year term (pg. 2-18). EPA recommends that resources be dedicated to monitor and adapt these operational measures to ensure good performance (e.g., quantification of how many more whales are being protected with these measures

by reducing ship collisions relative to the no action and to Alternative 5, and at what cost to the shipping industry and NOAA's oversight over the five-year period).

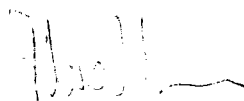
## Summary

Overall, EPA prefers Alternative 5 (environmentally preferable alternative) because it is the most protective against ship collisions with endangered right whales – and probably other cetaceans and marine mammals vulnerable to ship strikes. Alternative 6 is less restrictive/protective than Alternative 5. We note that Alternative 6 has also become less restrictive in the FEIS compared to the DEIS because some aspects have been made voluntary for economic reasons. Specifically, although SMAs are designated, DMAs have become voluntary and are only established when three or more whales are sighted. However, Alternative 6 provides more protection against ship-whale collisions than the current condition. We recognize that the operational measures under Alternative 6 would establish SMAs, recommended routes and speed restrictions, as well as allow voluntary establishment of DMAs. However, it is unclear if this level of protection is consistent with the overall recovery schedule of the right whale and with the ESA in general. We will defer to NOAA in this regard and request discussion in the ROD.

To strengthen Alternative 6, we support NOAA's proposed effects monitoring within the five-year term of the proposed measures. During this pilot-like period, we recommend that resources be dedicated to monitor and adapt these operational measures to ensure good performance. We recommend that the ROD further address such monitoring. Adapted operational measures subsequent to the five-year term should consequently provide even more protection for right whales and other marine mammals.

We appreciate the opportunity to review the FEIS. Should you have questions regarding these comments, feel free to contact Chris Hoberg of my staff at 404/562-9619 or [hoberg.chris@epa.gov](mailto:hoberg.chris@epa.gov).

Sincerely,



Heinz J. Mueller, Chief  
NEPA Program Office  
Office of Policy and Management

## DETAILED COMMENTS

EPA finds the format used to respond to comments on the DEIS in Appendix B of the FEIS is not user-friendly. We offer the following suggestions to reorganize future NOAA responses to benefit the public review:

\* Comment Sources – In Appendix B, public comments were listed and identified only by sequential numbers without indicating their source and/or comment topic. Accordingly, the public would need to tediously review all comments (121 comments on the DEIS, many with several sub-parts) in order to find the comments they made on the DEIS and NOAA's responses to those comments. This format is not a user-friendly approach that encourages public participation – one of the purposes of NEPA – and should be avoided in future NOAA NEPA documents.

\* Comment Letters – No copies of public letters were found in the FEIS. At a minimum, we recommend that federal, state and local government letters as well as major NGO letters be included for public review. In the absence of these letters, the listing of comments (paraphrased or excerpted) in Appendix B was the only source for public comments for the reviewing public.

\* Suggested Future Format – While we understand that voluminous comments must be managed in some way such as grouping similar comments by topic, we recommend that the author of the comments be listed. Listing can be accomplished through an index or actual listing of the authors within the bundled comments. Bundled comments could also be grouped by topic (noise, water quality, economics, etc.). In addition, we recommend that copies of comment letters from major agency and NGO sources be included in the same appendix as the responses so that the public can review the original wording in addition to any paraphrasing. Inclusion of a copy of major letters would also provide a context for the excerpts or paraphrased language listed.